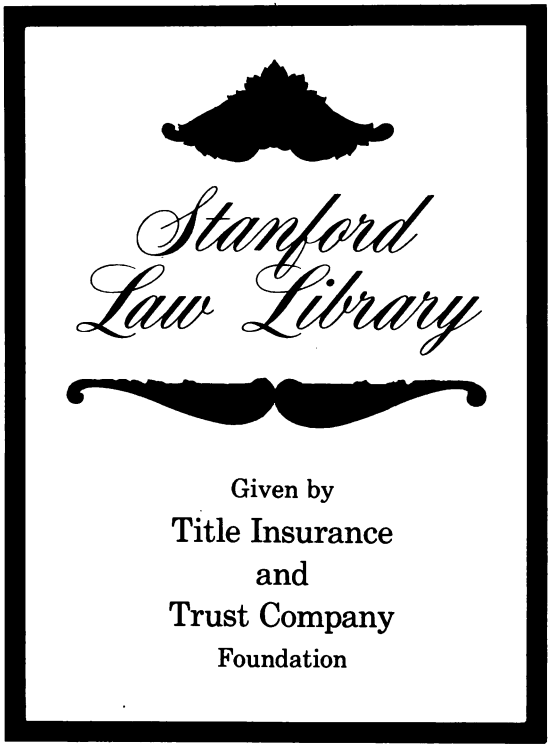
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ELEMENTARY VIEW.

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AN

ELEMENTARY VIEW

OF THE

COMMON LAW, USES, DEVISES,

AND

TRUSTS,

WITH REFERENCE TO THE

CREATION AND CONVEYANCE

OF

Estates.

BY

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1840.

TABLE OF CONTENTS.

ERRATUM.

Page 66, *last marginal note, for* claim *read* character.

AN

ELEMENTARY VIEW,

&c. &c. &c.

THE desultory course of reading and of practice commonly, and, in the dearth of elementary instruction, almost unavoidably pursued by the student in Conveyancing, is apt to leave him in a state of considerable embarrassment, as regards the various offices and powers of Common Law Conveyances, Uses, Devises, and Trusts. There is danger of his continuing in this state, throughout his professional career, unless, pausing in due time, he review his materials, and digest them under their appropriate heads, to which he may readily refer his future acquisitions. The following sheets have no higher aim than to assist the student in performing, to a certain extent, that necessary operation, and (where so much is to be

Prefatory remarks.

accomplished in so short a space) to guide his hand in tracing the outlines of a system, well-defined and simple in its general features, though nice and elaborate in its details. While conversant chiefly, in this stage of his progress, with established maxims and broad distinctions, his attention will be rewarded by the comparative certainty and permanence of the results; for hitherto, at least, the great rules of property, as settled on the foundations of Tenure and of Uses, have stood, with remarkable constancy, unremoved amidst the changes of opinion and the conflict of decisions. These are the common land-marks, which all unite in respecting and confirming.

Where only received and indisputable laws are to be stated and exemplified, the subject can derive no interest from either novelty or controversy. But, notwithstanding the beaten nature of the ground, and the successful endeavours of modern writers to facilitate the study of this branch of jurisprudence, something, perhaps, may yet be done towards exhibiting its governing principles in a more succinct, connected, and

strongly-contrasted point of view, and thus enabling the mind, with less expense of time and labour, to grasp and to retain them.

Component parts of the law of real property.

(1.) OUR Law of Real Property has been derived from different sources, and formed at different periods. It is, consequently, of a mixed character; being composed, chiefly, of a collection of ancient maxims and rules, called the COMMON LAW; of certain modes or forms of legal ownership and disposition, of later introduction, called USES; and of a system, based upon these, yet distinct and peculiar, called TRUSTS.

Common law.

(2.) The COMMON LAW is, for the most part, feudal; its principles and forms partake of the character, simple and severe, of the manners and policy which produced them. It is not of positive institution, but conventional. USES, as they now exist, derive their effect from a statute passed in the reign of Henry VIII., called *The Statute of Uses* (*a*). They existed

Uses.

(*a*) 27 Hen. 8, c. 10.

before that statute, under the same name, but with other qualities and for other purposes. As regards their actual state and practical application, they are, therefore, of positive institution.

Trusts. TRUSTS comprehend all those modifications of real property, which are neither of Common Law creation, nor Statute Uses. They are matters of conscientious obligation; the creatures of Chancery, which governs itself, sometimes by analogy to the Common Law, sometimes by different and even opposite principles.

Judicature, how divided, and why.

Law. (3.) The Common Law, and the Law of Uses, are administered by the same jurisdiction, consisting of the Courts of Law, so called; and an interest springing from either of these sources is usually denominated a *legal estate*. The Law of Trusts is administered by a separate jurisdiction, consisting of the Courts of Equity, so called; and an interest springing from this source is usually denominated an *equitable interest*. This separation of the courts is not without its reason or its use. Courts of Law were constructed for the primitive system, which was, comparatively, certain and simple. Uses, on assuming, under the statute, the

essential characteristics of common law rights, naturally fell within the cognizance of the same tribunals. But Trusts, often to be wrung from the conscience, or drawn from perplexed and obscure sources, were wholly unsuited to the constitution of those courts:—other and more searching powers were necessary to reach them. Hence arose the existing distribution of the judicature, which is not, as many suppose, accidental and arbitrary, but proceeds on the adaptation of the means to the end. Equity.

(4.) Testamentary dispositions of real property, called "Devises," which derive their force from positive enactment (*a*), are referable to the legal, or to the equitable branch of the judicature, according as the subject-matter of the devise is an ownership under the Common Law or the Law of Uses, on the one hand, or under the Law of Trusts, on the other. Devises.

(5.) Though a Court of Law is the appropriate tribunal for the owner of the legal estate, yet the The legal ownership, how far cognizable in equity.

(*a*) 1 Vict. c. 26.

doors of Equity are not closed against him. Particular circumstances may render redress at law impracticable, or the remedy there difficult, or inadequate; he may then obtain relief in a Court of Equity. It may, therefore, be said that the equity is always latent in the legal ownership. But ordinarily the legal owner must sue in a Court of Law; special circumstances are requisite to found *his* application to a Court of Equity for its extraordinary aid.

The equitable ownership, how considered at law.

(6.) Thus the right of the legal owner to relief in equity may exist concurrently with his right to redress at law; but (unless by reason of some special provision of the legislature) the converse position never holds. The owner of an equitable estate cannot, as such, be heard in a Court of Law. It is sometimes said, but inaccurately, that a Court of Law cannot take notice of a trust or equity. As, however, the judge, who would dispose satisfactorily of matters *within* his jurisdiction, must occasionally extend his views *beyond* it, nay, expatiate over the whole range of jurisprudence, so Courts of Law are often obliged to *see* a trust or an equity, in order to solve questions affecting

the legal estate, though they cannot directly adjudicate on equitable claims. Thus, the legal estate of a trustee is often measured by the scope of his trust, and an equitable interest may constitute a good consideration for a legal promise.

Technical character of the legal, as distinguished from the equitable ownership.

(7.) The question whether a claimant has or has not the legal estate, depends on the construction or effect of words or forms; while the question whether the claimant has, or has not the equitable interest, is, for the most part, one of spirit and substance. A conveyance made, or a use limited, in due form of law, is legally operative by reason of the formalities observed; but the most aptly expressed trust may be repelled by evidence, internal or extrinsic, of the substantial *equity* of the case.

At law, the legal estate, though held in trust, is the ownership.

(8.) The legal estate (although taken under the limitation of a *use*) may or may not be *beneficial* to its owner. This, indeed, necessarily follows from the existence of *trusts*. But whether he has it for his own benefit, or merely as a trustee for another, the very same rules are applied by Courts of Law, and all the *legal* incidents and

consequences are the same. The structure of the judicature, already adverted to, renders this also an obvious consequence.

Whether the legal owner is *in* at the common law, or otherwise, in what respect material.

(9.) If the legal owner acquired his estate, otherwise than by way of Use or by Devise, he is said to be IN *at the Common Law*. When once *in*, however, the question by which of the three modes, (Common Law, Use, or Devise,) he became entitled, is not often material. But for the purpose of determining whether the claimant is, or is not entitled, it becomes important to consider the difference in the nature of these several modes of acquisition.

Common law, uses, devises, and trusts—their relative capabilities.

(10.) The Common Law, as we have intimated, is narrow and strict. Uses have greater scope and flexibility. Devises unite the same advantages with more simplicity. Uses and Devises either agree with the Common Law, or they contravene it: Uses, indirectly; Devises, directly. To Trusts, even larger license is allowed. These diversities, which are to be carefully noted as cardinal points, we now propose to illustrate.

FREEHOLD ESTATES. —AT LAW.

We shall begin with estates of the rank of freehold, which, from having been regarded by the ancient law with peculiar interest, are the most fruitful of nice and important distinctions. And, first, as to *legal* estates of that degree:—

Estates of freehold, how created at the Common Law.

(11.) I. Such estates (*i. e.* estates of the rank of freehold), when they arise at the Common Law, must be created, either by *Feoffment*, with livery; or by deed of *Grant;* or by deed of *Release*, founded upon some estate, already vested in the relessee, (but whether at the Common Law, or under the Statute of Uses, whether of the rank of freehold or not, and whether rightful or wrongful, is immaterial). If we consider the release of a remainder or reversion as differing from a grant, only in the circumstance that the person to whom it is made has already a place in the tenancy, the terms FEOFFMENT and GRANT will comprise all the freehold assurances now remaining at the Common Law. When a feoffment, or a grant, is made, simply and directly, to A. in fee, or to A. for life, remainder to B. in

tail, remainder to C. in fee, A. is *in*, or A. and the remainder-men are *in* at the Common Law. In point of technical form, the feoffment, or the grant, would be, in the first case, to A. and his heirs, or, more correctly, (as it is the office of the habendum to limit the estate) to A. (indefinitely), habendum to A. and his heirs; and, in the second case, to A. (indefinitely), habendum to A. for the term of his life, and, after his decease, to B. and the heirs of his body, and, on failure of such issue, to C. and his heirs.

Common law conveyances, good without consideration.

(12.) To the validity of a conveyance at the Common Law no *consideration* is requisite, though such a conveyance may, of course, be vitiated by an unlawful consideration.

Estates of freehold, how created by way of Use.

(13.) II. Such estates (*i. e.* estates of the rank of freehold), when they arise by way of USE, are created, either by conveying away the land, at the Common Law, by such of the modes of conveyance already specified as may be adapted to the state of the title, and then declaring uses upon that conveyance; or, without convey-

ing away the land, by simply declaring uses upon the present ownership of the party. The uses spring, in the one case, from the seisin created purposely to serve them, and are said to be attended *with transmutation of possession;* in the other, from the pre-existing seisin, and are said to arise *without transmutation of possession.* In the former instance, the party at once conveys and declares; in the latter, the party simply declares, (*i. e.*, in terms, "bargains and sells," or, "covenants to stand seised,") and the Statute of Uses, on that intimation, conveys.

—*with* transmutation of possession.

(14.) When a FEOFFMENT, or a GRANT, is made to A. in fee, to the use of B. in fee, or to the use of B. for life, remainder to the use of C. in tail, remainder to the use of D. in fee; A. (who is called the feoffee, or the grantee, to uses) is *in* at the Common Law, of the seisin of the fee, but (at the same moment) B. is *in,* or B., C., and D. are all *in* by force of the Statute of Uses. In point of technical form, the feoffment, or the grant, would be to A. and his heirs, or to A., indefinitely (*a*), habendum to A. and his heirs, to the

(*a*) *Vide ante,* (11.)

use of B. and his heirs, or to the use of B. for the term of his life, and, after his decease, to the use of C. and the heirs of his body, and, on failure of such issue, to the use of D. and his heirs. This is to create uses *with* transmutation of possession. We have seen that the *conveyance* itself needs no consideration (*a*); nor, as the maker thereby departs with the actual possession of the land, is any consideration necessary to give effect to the *uses*.

—*without* transmutation of possession.

(15.) So, when the owner makes a BARGAIN AND SALE (of course, by deed indented and inrolled, according to the Statute of Inrolments (*b*)), to A. and his heirs, or to A. for life, with remainders, as in the above example (*c*), or enters into a COVENANT TO STAND SEISED, to the use of A. and his heirs, or to the use of A. for life, with like remainders, A. is *in*, or A. and the remaindermen are *in* by force of the Statute of Uses. This is to create uses *without* transmutation of possession.

What consideration.

(16.) But as, in the case of the bargain and

(*a*) *Vide ante*, (12.)
(*b*) 27 Hen. 8, c. 16.
(*c*) *Vide ante*, (14.)

sale, and of the covenant to stand seised, the bargainor, or the covenantor, does not (independently of the operation of the Statute of Uses) divest himself of the possession of the land, a consideration, and *that* of a peculiar nature, is necessary to raise the use;—money or money's worth, in the instance of the bargain and sale, (but a farthing *expressed* to be paid, or rather acknowledged under seal to be received, suffices) —marriage, or consanguinity, in the instance of the covenant to stand seised.

ration necessary to raise uses *without* transmutation of possession.

(17.) Thus (fines and recoveries having been recently abolished (*a*), and releases being here treated as in the nature of grants (*b*)), feoffments and grants, operating at the Common Law, and bargains and sales, and covenants to stand seised, operating under the Statute of Uses, comprise all the modes of conveyance by which a legal estate of freehold can now be created inter vivos.

Freehold conveyances (at the common law, and by way of use) enumerated.

(18.) An appointment, by the donee of a power

Appoint-

(*a*) 3 & 4 Will. 4, c. 74, (England); 4 & 5 Will. 4, c. 92, (Ireland).

(*b*) *Vide ante*, (11.)

ments, why excluded from this enumeration.

to appoint the use, cannot be correctly treated as a distinct species of legal assurance, because the uses appointed spring from the seisin raised on the creation of the power. The power, indeed, is itself but a modified, or an *enabling* use, which, if the power be general, may give existence to other uses, involving other powers, ad infinitum, all fed, to the remotest period, from the same fountain.

Freehold conveyances may be reduced to feoffments, grants, and the Statute of Uses.

(19.) On a larger view, the Statute of Uses may be considered as a general legal conveyance, superadded to the old Common Law assurances, and destined to clothe every use with a corresponding legal interest. Thus, the freehold assurances of the kingdom would be reduced to Feoffments, Grants, and the Statute of Uses.

Of certain technical impediments, as regards uses to spring from the party's own seisin.

(20.) Were it not that certain technical requisites, in regard to both bargains and sales and covenants to stand seised, confine their practical application, uses would cease to be raised *with* transmutation of possession, and the Statute of Uses would, virtually, be the sole conveyance. A., seised in fee, would either bargain and sell,

or covenant to stand seised, agreeably to the intended destination of the land; the cestui que use would be *in*, by force of the Statute, of a commensurate legal interest, whatever form or mode the use might assume; and, on every subsequent alienation, the same process would be repeated, to the total neglect of the old Common Law assurances. In short, if the party could declare uses on his own seisin, as freely as he may declare them on the transient seisin of a feoffee, or a grantee to uses, the more complex process would naturally yield to the more simple.

—as regards uses to spring from the seisin of another.

(21.) Again, the raising of a use is fettered in practice by annexing to uses declared on the seisin of another the requisite of a seisin merely *momentary*, created by transmutation of possession *at the Common Law*. This flows from the doctrine relative to cumulative or secondary uses. When a feoffment, or a grant, is made to A., to the use of B., to the use of C., B. is *in* by force of the statute, and the use limited to C., though limited *simultaneously*, and, as part of the same transaction, is "a use *upon* a use," which the statute will not execute. So, a bargain and

sale to (i. e., in effect, to the use of) B., to the use of C., or a covenant to stand seised to the use of B., to the use of C., vests the legal estate in B., and the use limited to C. remains unexecuted. And, a fortiori, no *subsequent* declaration of use, upon the seisin of B., (not being the bargain and sale, or the covenant to stand seised, of B. himself), can be operative. The principle, and the result, would be the same, even if the feoffment, or the grant, were made to B., to the use of B. himself; for, though B. would then be *in* at the Common Law, (the statute for annexing the possession to the use obviously operating only where *one* person is seised to the use of some *other* person (*a*)), yet, the use limited to B. would not be the less a *use*, within the meaning of the proscription directed against "a use upon a use," because limited to one who needs not the aid of the statute to invest him with the seisin. Hence, whether the seisin be acquired *under* the statute, or continue *notwithstanding* the statute, it cannot be the medium for serving uses. In speaking, therefore, of "a feoffee to uses," or a "grantee to

(*a*) 6 Barn. & C. 305; 9 Dowl. & R. 416.

uses," we must always be understood to speak of one whose seisin is at the Common Law, and (as respects the uses) but for a point of time.

Why uses, purely voluntary, arise *with*, but not *without* transmutation of possession.

(22.) We may here add the reason why a use, destitute of consideration, arises *with*, but not *without* transmutation of possession. When, *before* the Statute of Uses, A. conveyed the land to B., to the use of C., A., the grantor, could not resume the possession against his own grant, nor could B., the grantee, who had charged himself with the use, refuse to perform it. The statute, therefore, executes that use which the Chancery would have executed. But if, *before* the statute, A., without either any valuable consideration (as money, or money's worth,) or any meritorious consideration, (as, marriage, or natural affection towards a child or other relation in blood,) had made a simple declaration of use in favour of C., the legal possession would have remained with A., the owner, and the Chancery would not have been active to take its fruits from *him*, at the suit of a mere volunteer. The statute, therefore, found no use to be executed. It is true that a

nominal (*a*) consideration satisfies the statute, but in this respect its expounders are quite consistent; for as, according to their view, uses themselves are (as regards the right to the usufruct (*b*)) merely nominal, the *form* of a use is fitly supported by the *form* of a consideration. We described uses, in the outset, as "modes or forms of legal ownership or disposition" (*c*).

Estates of freehold, how created by devise.

(23.) III. Such estates (*i. e.* estates of the rank of freehold) may also arise by DEVISE, either by force of the Statute of Wills (*d*), exclusively, or partly by force of that statute and partly by force of the Statute of Uses. When land is devised to A. in fee, or to A. for life, remainder to B. in tail, remainder to C. in fee, A. is *in*, or A. and the remainder-men are *in* under the Statute of Wills. But when land is devised to S. in fee, to the use of A. in fee, or to the use of A. for life, with like remainders, S. is *in* under the Statute of Wills, but A. is *in*, or A. and the re-

(*a*) *Ante*, (16.)
(*b*) *Ante*, (8.)
(*c*) *Ante*, (1,) and *vide ante*, (7.)
(*d*) 1 Vict. c. 26.

mainder-men are *in* under the Statute of Uses. The better opinion, at least, is, that devises are within the latter statute, though passed antecedently to the Statute of Wills.

HAVING described the different means by which legal estates of freehold may be created, we shall next attempt, (pursuing the order of the distribution already adopted,) to distinguish the offices and powers common, or peculiar, to those different means, as respects the modification of the ownership.

Offices and powers of freehold conveyances distinguished.

I. AS TO SUCH ESTATES, WHEN CREATED AT THE COMMON LAW.

COMMON LAW.

(24.) The estate, so created, may be either immediate or future, and either in fee, (simple or base,) in tail, or for life; but, if future, it must be preceded by, and limited to take effect immediately after, an immediate estate or estates in tail, or for

Particular estates and remainders.

life, created by the same conveyance. When a feoffment, or a grant, is made to A. for life or in tail, and after his death or on failure of his issue, to B., for life, in tail or in fee, the estate of A. is immediate; the estate of B. is future. A. has a *particular* estate (*a*), so called, and B. has a *remainder*, so called, expectant on the estate of A., and supported, in point of tenure, by his seisin. The distribution of estates into vested and contingent may be introduced with more advantage at a later stage.

Freehold limitations *in futuro*, void.

(25.) But a feoffment, or a grant, to take effect from a subsequent period or on the happening of an event, as to A. from Christmas next, or to A. on the return of B. from Rome, is an attempt to create, at the Common Law, an estate of freehold to commence *in futuro*, or, in other words, a *substantive* limitation of a future estate; and, as such, is, for reasons derived from the feudal policy, if not inherent in the very nature of the primitive modes of conveyance, absolutely null. So a feoffment, or a grant, to A. for life, and *from*

(*a*) *i. e.* An estate constituting only a parcel, *particula*, of the fee.

Christmas next after his death, to B., for life, in tail or in fee, is, for the same reasons, void, as respects the limitation to B.

General character of common law limitations.

(26.) All freehold estates, created at the Common Law, must, therefore, be estates for life, in tail or in fee, commencing presently, or to commence on the instant of the determination of a prior estate for life or in tail, commencing presently. As there must be an immediate limitation of the freehold, so consecutive estates of the same degree, limited after that immediate limitation, must succeed in one unbroken series.

A chattel interest may precede the first freehold limitation.

(27.) It should be understood, however, that if the conveyance be to A. for a term of years, however long, and, after the expiration of the term, to B. for life, in tail or in fee, the estate of B. is an estate commencing presently, within the meaning of the rule already stated; for, as the term is immediate and is followed immediately by the limitation of an estate of freehold, and as the possession of the termor is the possession of the freeholder, there is not, in this case, any suspense or vacancy of the freehold.

Conveyances of remainders and reversions subject to the same rules.

(28.) Again, it must be noticed, that, though the freehold or the fee, which forms the subject of conveyance, should not be itself immediate, yet the same rules would govern. When, therefore, A., entitled to a *remainder* or *reversion* of freehold or inheritance, expectant on a previous estate for life or in tail, grants his remainder or reversion to A. from Christmas next, or on B.'s return from Rome, or to A. for life, and, from Christmas next after his death, to B., the conveyance, in the first example, and the limitation to B., in the second, is void.

USES.

II. As to such estates, when created by way of use.

Uses agree, or disagree, with the common law.

(29.) Uses have less simplicity and unity of character. They divide themselves into two classes;—those which conform, and those which do not conform, in point of limitation, to the Common Law. To the one, or to the other of these classes, every use (whether created with, or without transmutation of possession) is referable.

As they differ essentially, they must be considered distinctly.

1. *As to Uses which* conform *to the Common Law.*

(30.) Estates arising under uses of this class have all the qualities and incidents of estates limited purely at the Common Law. The mode of their creation is different, but the condition of their actual existence is, in all respects, the same. Thus, whether, on the one hand, A. makes a feoffment, or a grant, to B. for life, and, after his death, to C. and the heirs of his body, and, on failure of such issue, to D. and his heirs; or whether, on the other hand, A. makes a feoffment, or a grant, to B. and his heirs, to the use of B. for life, and, after his death, to the use of C. and the heirs of his body, and, on failure of such issue, to the use of D. and his heirs, or makes a bargain and sale, or (if the relation of the parties admit of it (*a*)) enters into a covenant to stand seised, to the like uses; the result is, that B. is legal tenant for life,

Of uses that agree with the common law.

(*a*) *Vide ante*, (16.)

with a legal remainder to C. in tail, with a legal remainder to D. in fee, and that the estate of B., and the estates of the subsequent takers, answer to the terms, obey the rules, and confer the rights and remedies appropriated by the Common Law to a particular estate and expectant remainders. The uses are at once, by force of the Statute of Uses, legal estates, and, from their form and order, legal estates in exact accordance with the simple destinations of the Common Law. It is obvious, that where uses of this class are alone created, recourse is had to the Statute of Uses, instead of the Common Law, not from any legal *necessity*, but simply because the *form* of conveying to uses is more convenient or more familiar.

2. *As to Uses which do* not conform *to the Common Law.*

Of uses that disagree with the Common law.

(31.) Uses of this class may be described as al together eccentric; as deviating from the course prescribed by the original laws of the system, not without considerable disturbance of its ordinary operations. Still this irregularity is relative only;

for these uses are also confined within definite limits, and are governed by settled, though peculiar, laws. As the practitioner has daily occasion for their agency, their nature and properties demand the student's particular attention. We may, for the greater convenience of examination, class them under two heads.

—divisible into, 1. Springing Uses.

(32.) 1. The one class consists of uses that limit an estate of freehold, contrary to the course of the Common Law, substantively, and not in defeazance of any other limitation of use contained in the same instrument. As, for example, when A. makes a feoffment, or a grant, to B. and his heirs, to the use, from Christmas next, or on D.'s return from Rome, of C. for life, in tail or in fee, or to the use of the first unborn son of C. for life, in tail or in fee; or (if the relation of the parties admit of it (*a*)) covenants to stand seised, to the use, from Christmas next, or on D.'s return from Rome, of C. for life, in tail or in fee, or to the use of the first unborn son of C. for life, in tail or in fee:—here, at Christmas, or on

(*a*) *Vide ante*, (16.)

D.'s return, or on C.'s having a son born, the use limited to C., or to his first son, is said to be *executed;* in other words, and to speak more correctly (*a*), the legal estate then vests in the cestui que use. In the meantime, the use is said to be *executory*. It is obvious, that, if the use were limited to A. for life or in tail, and after his death or the failure of his issue *and one day*, or from any given period, or on the happening of any given event, *subsequent* to his death or to the failure of his issue, then to B. for life, in tail or in fee, the same observations must be true, in regard to the use limited to B., which, being disjoined, by an interval of time, from the previous use, would stand, like C.'s use in the preceding example, an isolated limitation of an estate of freehold to commence *in futuro*. A use, thus circumstanced, may be called a *springing* use.

2. Shifting Uses.

(33.) 2. The other class consists of uses that limit an estate of freehold, contrary to the course of the Common Law, in defeazance of some other limitation of use contained in the same instrument. As, when A. makes a feoffment, or a

(*a*) *Post*, (36.)

grant, to B. and his heirs, to the use of C. for life, but if D. shall return from Rome in C.'s life-time, then to the use of D. for life, in tail or in fee; or to the use of C. in tail, but if the earldom of S. shall descend upon C. or his issue, then to the use of D. for life, in tail or in fee; or to the use of C. in fee, but if he shall die under twenty-one or die without leaving issue, then to the use of D. for life, in tail or in fee; or, if C. shall marry E., then to the use of C. for life, with remainder to the use of E., for life; or when A. (the relation of the parties admitting of it (*a*)) covenants to stand seised, to the like uses:—here, on D.'s return in C.'s lifetime, or on the descent of the earldom upon C. or his issue, or on the death of C. under twenty-one or without leaving issue, (as the case may be), the use limited to D. is executed; and so, on the marriage of C. with E., the use limited to C. for life, and the use limited in remainder to E., are executed. In the meantime, these uses are executory. A use thus circumstanced may be called a *shifting* use.

(34.) But, on a little consideration, it will be ob- Uses, dis-

(*a*) *Vide ante*, (16).

agreeing with the Common Law, referred generally, to the same principles.

vious that this, or any similar distribution of uses that refuse obedience to the Common Law, can have no foundation in principle. For, with respect to the uses arranged under the first head (*a*), they take effect by defeating, to the extent of the ownership comprised in them, the fee previously vested (by way of resulting use) in A., the grantor, or (if the resulting use be negatived) in B., the grantee, or (as the case may be) previously vested in A., the covenantor: while, with respect to the uses arranged under the second head (*b*), they take effect by defeating, to the like extent, the fee previously vested in the takers under the other limitations, or (if those limitations should not exhaust the fee) partly in such takers, and partly (by way of resulting use) in A., the grantor, or (if the resulting use be negatived,) in B. the grantee, or (as the case may be) partly in such takers, and partly in A., the covenantor. If, on the one hand, the use do *not* tend to defeat any previously vested estate, then it conforms to the Common Law, and belongs to the regular class of which we have already treated (*c*); if, on the other hand, the use *do* tend to defeat any previously

(*a*) *Ante*, (32.) (*b*) *Ante*, (33.) (*c*) *Ante*, (30.)

vested estate, then, (whether that estate was or was not taken under the limitation of a use contained in the same instrument), it is plainly non-conformable to the Common Law, and, as such non-conformity admits of no degrees, it belongs, in either case, to a class of limitations which acknowledge one common nature and are governed by equal laws. In truth, all the irregular uses of which we are now speaking, whether associated with other limitations or not, engraft themselves on the seisin, generally, of the legal fee, which is always necessarily resident somewhere in a vested state; drawing out, as they arise, the requisite quantity and quality of legal interest, without regard to any modifications which may have been impressed upon that fee. As one limitation can be dependent upon another only by the law of tenure, and as a freehold limitation to be so dependent, must be a remainder (*a*), *every* freehold limitation, by way of use or devise, which has not the requisites of a remainder, is necessarily a *substantive* limitation.

—their condition, when executed, into estates.

(35.) It is almost superfluous to add, that when a use, though not limited in conformity to the

(*a*) *Ante*, (24.)

Common Law, is eventually executed, it is thenceforth as much a legal estate, amenable to Common Law jurisdiction, as if it had been limited agreeably to the rules of tenure. Thus, in the example above given (*a*), of uses limited to arise if C. shall marry E., C., on the happening of that event, becomes legal tenant for life, with a legal remainder to E. for life, and the estates of C. and E. have all the common law properties of a particular estate and an expectant remainder.

All uses are, as respects the statute, executed.

(36.) It must be observed, that the terms *executed* and *executory*, when applied to uses, are employed merely to mark the distinction between such limitations, by way of use, as agree, and such as disagree, in their inception, with the Common Law, and not as importing that the statute executes some limitations, by way of use, on their creation, leaving others to be executed in event or at a future period. On the contrary, the statute operates but once, and communicates, at the same instant, to uses of both classes, the properties of the legal seisin. All uses, therefore,

(*a*) *Ante*, (33.)

from the very moment of their inception, cease to be *uses*, and assume a legal character, provided the seisin be commensurate with the use. Such as agree with the Common Law, and are capable of vesting, are executed into legal *estates;* while such as do not agree with the Common Law, or, agreeing with it, are contingent, are executed into legal *rights* or *titles*. Hence, whenever uses are created by deed, as the seisin to serve them must be a present seisin, the statute finally discharges *its* office on the execution of the deed; and the only exception to the general principle, that every use, within the purview of the statute, is, from the very beginning, a *legal* limitation, occurs where the uses are created by will, and the *devise* itself is executory, as in the instance of a devise, in case B. shall die without leaving issue, to A., to the use of C.; for, since A. has no seisin till the contingency happens, the statute cannot, of course, execute the use. Consequently, those uses which we have denominated *executory*, are, as respects the statute, and in contradistinction to uses in their original fiduciary or equitable state, *executed.*

DEVISES.

III. As to such estates when created by devise.

Of freehold uses created by devise.

(37.) It has already been observed (*a*) that estates may be raised, through the agency of uses, by Devise, as well as by conveyance *inter vivos*. When that agency is employed by a devisor, the limitations are subject, throughout, to the same rules as similar limitations contained in a conveyance.

—by direct devise.

(38.) But in order to effect the intention of a devisor, recourse to the circuitous medium of uses is in *no* case *necessary*. For it is *his* peculiar privilege to be able to dispose at once, not only in accordance with the rules of the Common Law, but in any of those modes which have been described as not conforming to that law. Thus, if A. devise to C. for life, but if D. shall return from Rome in C.'s lifetime, then to D., for life, in tail or in fee, this direct devise to D. is valid. On the return from Rome of D., in C.'s lifetime,

Executory devises.

(*a*) *Ante*, (23.)

the devise will be *executed* in D., or, in other words, the legal estate will vest in him. In the meantime, the devise to him is said to be *executory*. And so, in regard to devises corresponding with the other examples above adduced (*a*), in treating of uses that refuse conformity to the Common Law.

Devises and uses, of equal ductility.

(39.) In short, the power of moulding the legal ownership of land, by conveying, *inter vivos*, to uses, or by devising to uses, and the power of moulding that ownership by devising, simply and directly, to the intended objects, without the machinery of uses, are, as regards freehold interests, precisely co-extensive.

General conclusions.

The General Conclusions to be drawn from these premises are—

I. As to direct dispositions *inter vivos*.

(40.) I. That the limitation of an estate of freehold by way of *direct* disposition, operating *inter*

(*a*) *Ante*, (32.), (33.)

vivos, must strictly observe the rules of the Common Law, or, in other words, the rules of tenure, in regard to the creation of such estates; and, consequently, that when uses are to arise from transmutation of possession, the seisin to serve them must be created according to those rules. Hence, if A. make a feoffment, or a grant, to take effect from and after the solemnization of the marriage of A. with C., to B. and his heirs, to certain uses, (as distinguished from a feoffment, or a grant, to take effect presently, to C. and his heirs, to certain uses, not to arise until the solemnization of the marriage,) the conveyance is void (*a*), and the uses, (unless the instrument be capable of operating as a bargain and sale, or as a covenant to stand seised,) necessarily fall with it.

II. As to indirect dispositions *inter vivos*.

(41.) II. That the limitation of such an estate, by way of *indirect* disposition, (namely, through the medium of uses,) operating *inter vivos*, is free to adopt or to reject those rules.

III. As to devises.

(42.) III. That the limitation of such an estate,

(*a*) *Ante*, (25.)

by way either of direct or of indirect disposition, by *devise,* is equally free to adopt or to reject those rules.

Of *contingent* remainders, how they may be known.

(43.) We shall now be prepared to enter upon the subject of *contingent* remainders; a subject formidable, chiefly from having been gratuitously connected with abstruse disquisitions. When the nature of a *remainder,* or, in other words, of a future estate of freehold, limited, either at the Common Law, or by way of use, or of devise, in accordance with the Common Law, as distinguished from an executory use, or an executory devise, is clearly understood, the general character of a *contingent* remainder will be readily apprehended, inasmuch as the student has merely to combine with his preconceived idea of a remainder the contingent ingredient.

Example of a vested remainder,

(44.) For example:—A. conveys, at the Common Law, to B. for life, and after his death, to C. for life, in tail or in fee. We have seen that here

the limitation to C. is a remainder (*a*); and that, if the limitation were by way of use, it would be equally a remainder (*b*). We have likewise seen why it is a remainder (*c*), namely, because it is made to take effect immediately on the determination of the preceding estate of B.; for, in construction of law, the words "after his death" are equivalent to "on the instant of the determination of his estate." This limitation is a *vested* remainder, inasmuch as it has an ascertained owner in C., who, if the prior estate were removed, would be entitled to fill the possession.

—converted, by interposing an *event* into a *contingent* remainder.

(45.) The Common Law, however, did not require that remainders should vest on their *creation,* but was satisfied with having a tenant for the time being of the immediate freehold. Now, if we introduce an *event* as requisite to give effect to the remainder,—if, for example, we simply engraft on the words "after his death" the words "in case D. shall return from Rome," we have, then, obviously, a *contingent* remainder; for the limitation to C. is to take effect, as before, on the in-

(*a*) *Ante,* (24.) (*b*) *Ante,* (30.)
(*c*) *Ante,* (24.), (25.), (32.)

stant of the determination of the estate of B., and is, therefore, a *remainder*, but it is not to take effect *unless* D. should return from Rome, and is, therefore, a *contingent* remainder. This, of course, D. may not do before the determination of the estate of B., and if the limitation in question were capable of taking effect on the *subsequent* return of D., then it would not be a *remainder*, as it would not conform to the Common Law; but must be an executory use, or an executory devise (*a*).

Certainty of the event, abstractedly, not material.

(46.) If the event, abstractedly considered, on which the remainder is made to depend, were *certain*, (as, the death of D.), the remainder would not be the less contingent, inasmuch as it is the legal necessity which exists for the occurrence of the event before a given period, namely, the determination of the prior or particular estate (*b*), and not the dubious nature of the event itself, that creates the *contingency*. All limitations, therefore, of legal estates of freehold, which answer to the description of a *remainder*, but which depend, for their taking effect, in point of interest,

(*a*) *Ante*, (32.), (33.), (38.) (*b*) Ib.

on the happening of *any* event, are contingent remainders.

Destructibility of contingent remainders,

(47.) The distinguishing quality, common to all contingent remainders, is *destructibility*, under the doctrines of tenure; by which must be understood liability to failure notwithstanding the actual occurrence of the event on which the remainder hinges.

Modes of destruction.

(48.) There are several modes of destruction:—the non-occurrence of the event within the time of the particular estate, when that estate is suffered regularly to expire; the act of the particular tenant; or the act of Law.

—by the regular expiration of the particular estate.

(49.) Let us take the example of a conveyance, either at the Common Law or by way of Use, to A. for life, remainder, *in case* C. shall return from Rome, to C. in tail, remainder to D. in fee. Here, if A. dies, C. not having returned from Rome, the contingent remainder to C. fails, by the regular expiration of A.'s estate. This mode of failure is not ordinarily possible, because, in the great majority of cases, the contingency must, from its nature,

happen, if at all, during the particular tenancy; as, in the common case of a settlement upon A. for life, remainder to his first and other unborn sons in tail, where the contingency is the birth of a son of the particular tenant before his estate determines.

—by the premature determination of the particular estate.

(50.) So, if A., the tenant for life, makes a feoffment in fee, thereby forfeiting his estate, or surrenders his estate to D., or accepts a release from D. of his (D.'s) estate, before the return of C. from Rome, the contingent remainder fails, by the act of the particular tenant, which causes a premature determination of A.'s estate. Again, if A. and D. join in a conveyance to E. in fee, before C.'s return, A.'s estate merges, and the contingent remainder is therefore destroyed. So, if D. should die, leaving A. his heir, and D.'s estate should descend upon A., the same consequence would ensue.

Why the remainder necessarily fails, on the deter-

(51.) The effect, in each instance, is explained by referring to the very nature of a remainder (*a*),

(*a*) *Ante*, (24.), (25.)

mination of the particular estate before the contingency happens.

—an estate *immediately* consecutive on some preceding estate. In each instance, the particular estate is at an end; but the given event has not happened, and either the limitation to C. must take effect presently, contrary to the express words of contingency, or, taking effect on the subsequent occurrence of that event, must take effect *otherwise* than as a *remainder*.

Of contingent limitations, relatively to a pre-existing freehold estate.

(52.) It follows, also, from what has already been stated, respecting the creation of estates at the Common Law, that a particular estate of freehold, created by one instrument, cannot support a contingent remainder, created by another. If, therefore, A. first conveys to B. for life, and then, as a distinct transaction, conveys to C. for life, remainder, in case D. shall survive B. and C., to D. in fee;—here, on the death of C., living B. and D., the contingent remainder fails, notwithstanding that the life estate of B., under the first conveyance, is subsisting; for, by the removal of C.'s estate, the second conveyance now stands as a grant of A.'s reversion in fee, (*i. e.* the fee which remained in him, after the carving out of B.'s estate, by the first convey-

ance) to D., in case he shall survive B.; and being, as such, the grant of an estate of freehold, to commence *in futuro*, it is clearly void (*a*). The very same reasons of tenure, which would have rejected it, if originally limited in that form, avoid it now.

Uses answering to contingent remainders, but failing as such, cannot take effect as springing uses.

(53.) It may be asked, perhaps, why, if the limitations, in the last example, were by way of *use*, the limitation to D. should not still be valid, as a springing use, just as it would, unquestionably, have been if the previous limitation to C. had originally been omitted. The answer is furnished by the rule, already laid down (*b*), that uses limited conformably to the Common Law are governed, throughout, by the rules of that law. Were it not so, contingent uses, corresponding with remainders at the Common Law, would be indestructible, otherwise than by the act of the persons taking under such uses, for, though failing as remainders, they would be valid as executory uses. The rule may, indeed, be stated yet more strongly —that all uses which eventually agree with the

—though not originally limited as contingent remainders.

(*a*) *Ante*, (25.), (28.) (*b*) *Ante*, (30.)

Common Law, though not, in their inception, so agreeing, yield obedience to its rules. Suppose, for the sake of illustrating this statement of the rule, that the limitations were, from and after the death of A., to whom a particular estate for life is not previously limited, to the use of B. for life, and after B.'s death, to the use of C. in fee;—here, the uses, on their creation, do not conform to the Common Law, both being limitations of estates of freehold to commence *in futuro*, namely, from and after the death of A., and, consequently, executory uses. Now, if B. should die, living A., the limitation to C. can never become a *remainder*; but if A. should die, living B., then, on the death of A., both the uses would be executed—B.'s use as a particular estate, and C.'s use as an expectant remainder; which remainder, were it made to hinge on the event (for example) of C.'s surviving B., would be a *contingent* remainder.

The remainder must finally vest on the determination of the particular estate.

(54.) By the same rule (*a*), when the limitations are to the use of A. for life, and, after his death, to the use of the children of B., no child born

(*a*) *Ante*, (30.), (53.)

after the determination of A.'s estate can take, under the use so limited to the children; for the Common Law requires, that the remainder should not only vest, but vest indefeasibly at that period.

But contingent uses, never agreeing, in point of limitation, with the common law, cannot fall under the doctrine of remainders.

(55.) But the converse proposition, namely, that limitations, by way of use, not originally nor in event conformable to the Common Law, are obnoxious to its rules, does not, and cannot hold. If A. conveys, at the Common Law, to B. for a term of years, and on the determination of the term, to the first unborn son of B. for life, in tail or in fee, the limitation to the son is clearly void from the beginning, because it is neither a present estate of freehold, being limited to a person not in esse, nor a freehold remainder, which always supposes a prior estate of freehold, on which it may depend (*a*). But it follows, necessarily, that if A. conveys to B. and his heirs, to the use of B. for a term of years, and, on the expiration of the term, to the use of the first unborn son of B. for life, in tail or in fee, the limitation to the son is *valid*, as an

(*a*) *Ante*, (24.), (25.), (26.), (27.)

executory use; for it does not, in its inception, conform, nor, before the period when it would confer a vested estate, namely, the birth of the first son of B., can it conform, to the Common Law; and it is of the very essence of an executory use, that it *contravenes* the Common Law. At the Common Law, a conveyance to the first unborn son of A., and a conveyance to A. for a term of years, and, on the determination of the term, to the first unborn son of A., are alike void, and *that* for the very *same* reason, namely, the suspense of the freehold. But, under the doctrine of uses, the limitation of an estate of freehold, to commence *in futuro*, is good; and as the circumstance of its being preceded by a chattel interest, would not render it either more or less unpalatable to the Common Law, so that circumstance cannot affect its validity as a springing use (*a*). Since a vested

(*a*) The contrary doctrine "and it seems even to be law, that where a limitation was *intended* to take effect as a remainder, and cannot, it shall not be supported as a springing use" (1 Sugd. Pow. 27; Sugd. Gilb. Us. 165, n.) stands apparently on no principle. (See Sand. Us. 142, and Serjeant Hill's MS. there cited; *Gore* v. *Gore*, 2 P. Wms. 27, the case of a devise; but executory devises, and springing uses, have equal latitude).

estate for life or in tail, created by or under the given instrument itself, is, as we have seen, a necessary preliminary to the existence of a freehold remainder, whenever a freehold limitation at the Common Law is found to be neither immediate nor immediately expectant on such an estate, so created, we may certainly conclude that the limitation is void, as not being, even in point of intention, a remainder, (a freehold limitation expectant on an estate for years, being here treated as equivalent to an immediate limitation of the freehold (*a*)); and whenever we find a freehold limitation, by way of use or devise, similarly circumstanced, we may as certainly conclude, that the limitation (unless obnoxious to the rule against perpetuities (*b*)) is valid as an executory use or executory devise. In short, all uses, limited agreeably to the Common Law, are good, on Common Law principles; all uses not so limited (if observant of the rule against perpetuities) are good, on principles peculiar to uses.

(56.) Whatever has been observed under this Of contingent

(*a*) *Ante*, (27.) (*b*) *Post*, (64.)

remainders, created by devise.

head, with respect to *Uses*, is equally applicable to *Devises*.

Of the classification of contingent remainders, according to the nature of the contingency.

(57.) As the student may be apt to suppose, that the usual division of contingent remainders into classes (*a*), founds itself on some essential differences in their nature, it is proper to add, that their common characteristic is uncertainty; and that the only difference between, (for example), a remainder to A., if he shall survive B., and a remainder to the unborn child of A., is, that the given event is not identical. It may be said, indeed, that A. is a person in being, while the child is not; but, as respects capacity to take under the remainder, they are equally non-existent; for, in order to exist for *that* purpose, A. must survive C.

General illustration of the previous rules.

(58.) In order to illustrate and enforce, generally, the preceding rules, respecting the creation of freehold estates, let us suppose a feoffment or a grant to be made to A. in fee, to the use of B. for life, remainder to the use of C. in fee, with a proviso, that, in case D. shall have a son, the conveyance shall enure, after the decease of B., to

(*a*) See Fear. on Cont. Rem., C. I. s. 2.

the use of such son for life, in tail or in fee:—now, A. takes the fee at the Common Law, but has the seisin only for an instant; the estate of B. is a *particular* estate, while the estate of C., being to take effect on the immediate determination of the life estate of B., and *that* at all events, is a *vested remainder*, both created by force of the Statute of Uses; and the limitation to the son, being likewise to take effect on the immediate determination of the life estate of B., is also a remainder; but, inasmuch as it depends for its so taking effect on the event of the birth of a son, it is a *contingent remainder*, which, unless D. should have a son before the estate of B. determines, cannot arise. Here, therefore, the whole disposition takes effect at, or in strict obedience to, the rules of the Common Law (*a*); the vested limitations, and the contingent remainder, not by displacing any estate, after that estate has once vested in possession, but by anticipating the possession before it becomes, or in the very instant of its becoming, vacant. If D. should have a son before the estate of B. determines, then the limitations would thenceforth stand, supposing the limitation to the

(*a*) *Ante*, (24.), (25.)

son were for life or in tail, to B. for life, remainder (vested) to the son for life or in tail, remainder (vested) to C. in fee; or, supposing the limitation to the son were in fee, to B. for life, remainder (vested) to the son in fee. But, if the proviso were, that, in case D. shall have a son, the conveyance shall enure, from Christmas next after the decease of B., to the use of such son for life, in tail or in fee, the limitation to the son would assume the very different character of an *executory use* (*a*), being made to take effect otherwise than on the immediate determination of the life estate of B. Thus shaped, it is a substantive limitation, which cannot, indeed, disturb the life estate of B., but over-rides the remainder to C., and renders that remainder liable, in contravention of the rules of the Common Law, to be defeated, after it shall have become vested in possession. The determination of B.'s life estate, before the birth of a son of D., would not affect the limitation to such son, which, notwithstanding the existence of a son, would be incapable of vesting, till Christmas next after the death of B., down to which period it would retain its executory character:

(*a*) *Ante*, (32.), (33.)

when vested, however, if made for life, or in tail, it would be a particular estate, on which the limitation to C. would then be expectant as a remainder; but if made in fee, C. would of course be excluded. Again, if the proviso were, that, in case D. shall have a son, then the conveyance shall enure immediately on the birth of such son, to the use of such son, for life, in tail or in fee, the limitation to the son would have the same character, and would over-ride the entire fee, rendering B.'s particular estate, and C.'s estate in remainder, both liable to be defeated, partially, if the limitation to the son were for life, or in tail; or, wholly, if the limitation were in fee, to be superseded even after those estates shall become vested in possession (*a*). On the birth of a son of D., the limitation to such son, if made for life, or in tail only, would become a particular estate, on which the limitations to B. and C. would be expectant remainders (*b*).

(59.) Here it may be well to remind the student that technical phraseology is rarely required by law, even in deeds; and that a use, especially,

The word use, in the preceding propositions, may be changed for any other term of the same import.

(*a*) *Ante*, (34.) (*b*) *Ante*, (53.)

which owes its origin to Equity (*a*), may be created without employing *that*, or any other appropriate term. Every proposition, therefore, which has been laid down respecting limitations by way of *use*, would be equally true, if any other expression, bearing popularly the same import, were substituted. Thus, a conveyance to A. "to the use of B.," and a conveyance to A. "in trust for B.," or "upon trust to permit B. to receive the profits," or "in the confidence that A. will permit B. to receive the profits," or "to the intent that B. may enjoy the profits," are all identical, in point of effect; for, as these expressions would, before the Statute of Uses, have equally indicated the intention to confer on B. the beneficial title, so, since the statute, they are of equal force to give the legal estate; though the practitioner will, of course, employ on all occasions, the words "to the use," as being at once short, expressive, and discriminative, and (what should always be a primary consideration in the choice of legal language,) generally understood, in the same sense, by professional men.

(*a*) *Ante*, (2.)

(60.) INTIMATELY connected, as well with contingent remainders, as with executory uses and executory devises, is the doctrine of perpetuity. Such dispositions, if unrestrained, might hold the absolute property in suspense for an indefinite period. The rule against perpetuities;—at what limitations aimed.

(61.) It is obvious that a *vested* remainder could not tend to a perpetuity, because such a remainder is necessarily expectant, either upon a vested estate for life, which must drop with a life in being, or upon an estate tail, which its owner may at pleasure enlarge into a fee (*a*), and because the taker of such a remainder is necessarily a person ascertained, whose disability, if any, cannot operate to impede alienation beyond his own life. —not *vested* remainders,

(62.) But *contingent* remainders, under no restriction, would supply the means of making a perpetual settlement; as, by limiting to A. for life, remainder to his first unborn son for life, re- —but *contingent* remainders,

(*a*) 3 & 4 Will. 4, c. 74; 4 & 5 Will. 4, c. 92, (Ireland.)

mainder to the son of that son for life, and so proceeding, with a succession of estates for life, through several generations; for, as the owner of an estate for life cannot, by his own unassisted act, enlarge it, alienation of the fee would be suspended.

—and executory uses and executory devises.

(63.) Executory uses, and executory devises, might be employed to accomplish the same end; as by limiting to A. in fee, but in case he, or his heirs, shall execute any instrument purporting to alien the land, or on the performance of any other act or the happening of any given event, at any distance of time, then to B. in fee; for, though A., or his heirs, and B., or his heirs, might *together* alien the fee, yet, the necessity for the concurrence of B., or his heirs, would be a check, of indefinite duration, upon alienation of the fee or any certain derivative interest.

The rule stated.

(64.) Some rule, therefore, was necessary as to both common law and other limitations. The rule, as now settled (*a*), is, that the power of alien-

(*a*) *Cadell* v. *Palmer*, 10 Bing. 140; 7 Bligh's Par. Rep. New S. 202.

ing the fee may be suspended, *by force of the limitations*, during a life, (or the longest of any number of lives), in being at the time of the creation of the limitations, and, additionally, during twenty-one years, computed from the dropping of the same life, or of any *other* life, (or the longest of the same lives, or of any number of *other* lives), in being at the time of the creation of the limitations, but not during any longer period.

and applied, as regards remainders.

(65.) I. As to *remainders*, we may (for example) limit to A. for life, remainder to the children (i. e. *children*, as a class, born and to be born) of A., or to such children of A. as shall attain a given age, for life, in tail or in fee, with as many remainders over as we please, provided they all observe the same limits; and, as a *remainder* must vest, if at all, before, or in the very instant of the determination of the particular estate (*a*), the remainder would be equally within the rule, whether the given age were twenty-one or twenty-five. But, if we limit life estates only to the children of A., (which, clearly, we may do,) we cannot

(*a*) *Ante*, (45.)

superadd remainders to *their* issue; for we should then take a life (A.'s) in being and an indefinite number of lives (his unborn children's) *not* in being.

—as regards executory uses, and executory devises.

(66.) II. As to *executory* uses and devises, we may (for example) limit to A. in fee, and in case the issue of B. shall fail within twenty-one years from the death of A., then to C. in fee; but if the period of the failure of B.'s issue were indefinite, or were extended beyond twenty-one years from the death of A., the limitation to C. would be void. So, we may limit to A. in fee, and in case he shall die without issue living at his death, then to the unborn children of B. in fee, for the fee could not thus be suspended beyond the life of the survivor of A. and B., and we may take the longest of any number of lives in being. As A. may die, without leaving issue, in the lifetime of B., the suspense may last, in respect of any contingency of after-born children of B., during his (B.'s) life; as B. may die in the lifetime of A., having had a child or children, the suspense may last, in respect of the contingency of the death of A. without having issue, during his (A.'s) life. But we can-

not limit to A. in fee, and in case he shall die without issue living at his death, then to the children of the first unborn son of B.; for this would be to take the longest of several lives (A.'s and B.'s) in being, and to superadd a life (the unknown son's) *not* in being.

Allowance for gestation.

(67.) In applying the rule, a child *in ventre* must always be considered as a person *in esse*. The actual period of gestation is allowed, by the general law, in extension of the time of the rule, or rather, the time of the rule must be measured by its terms, as interpreted by the general law. If, therefore, we suppose A., B., and C., in the above examples, to be children *in ventre*, the results will be the same.

The twenty-one years, allowed by the rule, is an absolute term, irrespective of minority.

(68.) It should always be borne in mind, that the period of twenty-one years contemplated by the rule is *not* an allowance for *minority*, (whether originally so intended or not,) but an *absolute* term, during which, in addition to any life, or number of lives, in being, the vesting may be suspended. The general legal disability of minority, as well as that of lunacy, *may* prevent alienation

far beyond the period fixed by the rule, but is to be wholly laid out of consideration in deciding whether a given limitation transgresses the rule or not. Where land is limited to A. for life, remainder to his first and other sons successively in tail, (the ordinary course of settlement), an estate tail, which includes the power of alienating the fee (*a*), *must* vest, if the remainder vest at all, before, or immediately on the death of A. If A. should die, leaving a first son *in ventre*, which son should live to attain twenty-one, then the minority of such son would be added to the period during which alienation of the fee would, practically, be prevented; but this addition would be the result of the general legal incapacity of infancy, and not of the limitations (*b*), which, *per se*, would suspend the vesting no longer than the life of A. But if the land were limited (by way of use or devise) to A. for life, and after his death, to such of his children living at his death as should then have attained, or should afterwards attain twenty-one, in tail or in fee, the vesting *might* be suspended, *by force of the limitations*,

(*a*) 3 & 4 Will. 4, c. 74; 4 & 5 Will. 4, c. 92, (Ireland).
(*b*) *Ante*, (64).

for the full period of a life in being and twenty-one years; and if the land were limited (by way of use or devise) to A. for life, and after his decease, to such of the children of B. as should be living at the expiration of twenty-one years from the death of A., in tail or in fee, the vesting would be *certainly* suspended, *by force of the limitations,* (unless the second limitation should fail of effect), for the same period; and to which period, twenty-one years, for the minority of a child of B., living at the end of twenty-one years from the death of A., might be superadded by law.

Twenty-one years the extreme limit.

(69.) Though an absolute term of twenty-one years may be taken, either with or without a life or lives in being, yet the slightest excess will be fatal. We cannot, therefore, limit to A. in fee after twenty-one years, as, on the expiration of a term of twenty-one years *and one day,* from the creation of the limitation.

Excess, as regards the rule, avoids the limitation *ab initio.*

(70.) As a general principle, every limitation which transgresses the rule is altogether void in its inception; though this principle appears to

have been in some degree disturbed by holding all executory limitations, in defeasance of an estate tail, to be good in their creation, and by the indulgence, extended more recently, to *powers* (*a*).

Further distribution of freehold limitations, into,

(71.) We may distribute all the limitations, of which we have been speaking, in the preceding sheets, into limitations vested, absolutely and indefeasibly; limitations vested, subject to be partially divested or defeated; limitations vested, subject to be totally divested or defeated; and, limitations not vested.

Limitations absolutely vested.

(72.) I. As to limitations vested, absolutely and indefeasibly. If the limitations be to A. for life, and, after his death, to B. in tail, and on failure of B.'s issue, to C. in fee; the estates of A., B., and C. vest absolutely, on their creation. Each has a present fixed interest, postponed merely in point of actual enjoyment.

(*a*) See 2 Sugd. Pow. 494, and the cases there cited.

(73.) II. As to limitations vested, subject to be partially divested or defeated.—When the limitations, whether at the Common Law, or by way of use or devise, are to A. for life, and after his death to his children, (as a class), as tenants in common in tail, the limitation to the children, if A. should happen to have a child in being at the time of the gift, vests, on its creation, in that child; or, if A., not happening then to have a child, should have a child born during the subsistence of the estate for life, (which, of course, may determine by forfeiture, or otherwise, in his lifetime), vests in that child on its birth; but, in either case, subject, in the language of the books, "to open and let in" the children afterwards born, during the subsistence of the same estate, as they come into being; or, in other words, the limitation is vested, subject to be partially divested. The limitation to the children, in this example, though it should not be created at the Common Law, but by way of use or devise, yet conforms to the Common Law, and is, therefore, a contingent remainder (*a*), and as a remainder must finally vest, before the determination of the

Limitations vested, subject to be partially divested, —at the common law, or agreeing with the common law.

(*a*) *Ante*, (45.)

particular estate, or, at the latest, in the instant of its determination; the liability to "open and let in" ceases at that instant, and the estates, under the limitation, of the child or children already born, if any, are then absolute. The preceding example illustrates the nature and extent of the fluctuation, tolerated by the Common Law, in the state of the present title to the future possession.

—not agreeing with the common law.

(75). Again, if the limitations were to A. in fee, but, in case B. shall return from Rome, then to B. for life, the fee would vest immediately in A., subject to be partially divested, namely, to the extent of the contingent life estate limited to B.; but, as the limitation to B. would obviously not conform to the Common Law (*a*), it must, if valid, be an executory use, or an executory devise. So, in regard to the example given under the preceding head (*b*), a limitation, capable (by reason of express words) of embracing the children of A., born *after* the determination of his life estate, by forfeiture, or otherwise, in his lifetime, must, to be effectual, have the same executory character.

(*a*) *Ante*, (25.) (32.) (*b*) *Ante*, (73.)

(75.) III. As to limitations vested, subject to be totally divested or defeated.—If the limitations be to A. in tail, remainder to B. in tail, remainder to C. in fee, with a proviso, that, if the earldom of S. shall descend upon A., his estate shall cease, and the subsequent estates take effect, as if the estate, so ceasing, had expired, the estate of A. is vested, subject to be wholly defeated by the proviso. Here, it will be observed, that the limitations conform to the Common Law, and that, as the proviso merely expunges the limitation on which it operates, it does not interfere with the common law order of the limitations. So, if the limitations be to A. in fee, but, in case A. shall die without issue living at his death, then to B. in fee, the estate of A. is vested, subject to be wholly divested by the proviso; but, as the limitation to B. does not conform to the Common Law, it must, if valid, be an executory use, or an executory devise. So, if, in the previous example, the proviso were, not that A.'s estate shall cease, and the subsequent estates take effect, on the descent of the earldom, but that his estates shall cease, and the land go over to D., the limitation to D. would not conform to the Common

Limitations vested, subject to be totally divested.

—agreeing with the Common Law.

—not agreeing with the Common Law.

Law, and would consequently be void, unless created by way of use or by devise. In the one case, a remainder is accelerated; in the other, a new estate supervenes. Again, if, to the example given, under a preceding head (*a*), of a limitation to children, we add a limitation over, in the event of their dying under twenty-one, the estates of the children would vest on their births, subject to be divested by the limitation over; and such a divesting limitation could be effectual only by way of use or devise.

Limitations not vested.

(76.) IV. As to limitations not vested.—If the limitation be, substantively, to A., from and after Christmas next, or to A., on the return of B. from Rome, nothing vests in A. till the given period arrives, or the given event happens; and so in the contingent remainders, as well as in the executory uses and executory devises, of which examples have been given under the preceding heads (*b*), we have instances of limitations not vested.

Tests of limitations

(77.) The fact, that a limitation, though post-

(*a*) *Ante*, (73). (*b*) *Ante*, (73.), (74.), (75.)

poned in point of enjoyment, is vested, whether liable to be divested, partially or totally, or not, proves it to be, either a common law limitation, or a use or devise, conforming to the Common Law; — in short, a *remainder*. The fact, that a limitation, not vested, is to take effect *without* divesting or defeating any previously vested estate, equally proves it to be, either a common law limitation, or a use or devise, conforming to the Common Law;—in other words, *a contingent remainder*. But the fact, that a limitation, not vested, is to take effect, *by* divesting or defeating a previously vested estate, proves it either to be void, or to be an *executory use*, or an *executory devise*.

agreeing, and of limitations not agreeing, with the common law.

THE preceding distribution of legal limitations leads to several important practical results.

Practical deductions.

(78.) 1. The benefit of a vested limitation is an *estate*, alienable at law, as well by a conveyance, operating, *inter vivos*, as by devise. Such estate,

As to vested limitations.

if not immediate, may be *accelerated*, in point of enjoyment, by the forfeiture, surrender, merger, or cesser of a preceding estate; but it cannot be *destroyed*, or *barred*, by the taker of any preceding estate, not being an estate tail.

As to limitations not vested—whether agreeing, or disagreeing, with the common law.

(79.) 2. The benefit of a limitation not vested, whether conforming to the Common Law, or not, is a *right* or *title* only, inalienable at law by a conveyance operating, *inter vivos*, (except as to lands in Ireland (*a*)), though devisable (*b*). But if the person entitled to the expectant interest, assume, by *indenture*, not disclosing the true state of the title to convey, as though he were seised of an alienable estate, and the limitation should afterwards vest, he and his heirs will be *estopped* from alleging, that he had not a vested estate at the time of the conveyance, just as a man, assuming to convey, by indenture, an estate, to which he has no shadow of title, would, on afterwards acquiring the estate, be *estopped* from gainsaying his own solemn deed; but the binding of parties and privies, in respect of an estate, by way of estoppel, and the passing of an estate, by actual

(*a*) 4 & 5 Will. 4, c. 92, s. 22. (*b*) 1 Vict. c. 26, s. 3.

conveyance, must not be confounded in practice. Again, the benefit of such a limitation may always be released to the tenant of some vested estate of freehold or inheritance: the release operating by way of extinguishment of the right under the limitation.

—agreeing with the common law;

(80.) As to limitations not vested, but conforming to the Common Law, namely, contingent remainders:—these are liable, as we have seen, to be *destroyed*, by the removal, designed or accidental, of the particular estate on which they *depend*; they are also liable to be *barred* by the enrolled assurance (*a*) of the taker of a previous *estate tail*.

—not agreeing with the common law.

(81.) 3. As to limitations, not vested, and not conforming to the rules of the Common Law, namely, executory uses, and executory devises:—these are liable to be *barred* by the enrolled assurance (*b*) of the taker of an estate tail, which is subject to be itself defeated by the executory limitation, but, being *substantive* limitations (*c*), they

(*a*) 3 & 4 Will. 4, c. 74; 4 & 5 Will. 4, c. 92, (Ireland).
(*b*) Ib. (*c*) *Ante*, (34.)

cannot be otherwise affected (except under the terms of their creation) by any act or accident, done or happening in regard to any estate antecedently vested. Indeed, it will probably occur to the student, that their subjection to the power of a tenant in tail, is not easily reconcilable with their independent character. But the doctrine is, that even executory limitations, if *lying behind* an estate tail, are barrable; though the cases afford no certain light to guide us in the application of this rule (*a*).

Of equitable interests;

EQUITABLE interests, which remain to be noticed, are, from their nature, less fruitful of distinctions than the legal estate.

—their general claim;

(82.) Every equitable interest arises out of an obligation imposed upon the conscience of the legal owner, in respect of his ownership. Such an obligation is called a *trust*, and the resulting benefit is called, but inaccurately, a trust-

(*a*) See Sugd. V. & P., 10th ed. 276.

estate,—inaccurately, because it is obvious, that a right, precariously depending on personal confidence, is opposed to all our notions of an estate firmly based upon seisin.

(83.) Such as was the primitive, is the actual character of an equitable interest, which even at this day is not a direct interest in the land. For, though the Court of Chancery is, to a certain extent, armed by the legislature with the means (*a*) of reaching the land itself, where the remedy against the person proves inefficient, yet, as the land cannot be touched unless the conscience be affected, the personal liability is always the foundation and the measure of the specific relief. To illustrate this—suppose the estate were vested in A., in trust for B., and that A., in contravention of the trust, should sell and convey to C., who buys with *notice* of the trust; and that B. were to file a bill against C. for a reconveyance;—now, if C. should be a lunatic, or out of the jurisdiction, the Court would restore the land to B., by the indirect process of a reconveyance, to be

—confer no direct interest in the land.

(*a*) 1 Will. 4, c. 36; 1 Will. 4, c. 60, (amended by 4 & 5 Will. 4, c. 23; and 1 & 2 Vict. c. 69); 1 Will. 4, c. 67.

made by a person appointed for that purpose, under the authority of a particular act of parliament (*a*); but if C. had bought, *without* notice of the trust, he would be entitled to retain the estate, to the extent of the interest for which he had fairly contracted. Hence, it plainly appears that the language of Chancery, when it says, that "the *trust* is the *land* in this court," must be understood in a very limited sense.

Trusts executed, and executory, in what sense different.

(84.) Express trusts may be divided into two classes, commonly called *executed* and *executory;*—terms here applied in a sense very different from that which we annex to them in speaking of executory uses, and executory devises. Where the legal estate is vested in A., in trust for B. for life, and after his death, for his first and other sons in tail, with remainder to his daughters in common in tail, the trusts, being perfect in themselves, and the beneficial interests finally ascertained on the face of the instrument, are said to be *executed*. But when the estate is vested in A., upon trust to settle it in strict settlement upon B. and his issue, the trusts, being

(*a*) 1 Will. 4, c. 60, s. 8.

imperfect on the face of the instrument, and the beneficial interests left to be defined by a future settlement, are said to be executory. Still, as the trustee is, in either case, to *execute* the trust, (by a simple conveyance in the instance of the "executed" trust, by a strict settlement in the instance of the "executory" trust), and as the rules of equity equally determine how both species of trust shall be carried into execution, the only real difference is this,—that, in the case of the "executed" trust, the effect is fully declared in terms, while in the case of the "executory" trust, the same effect is latent in a short general direction.

Trusts, though agreeing with the common law, exempted from the rules of tenure.

(85.) We have seen that uses which conform to the Common Law obey all its rules, as being, by force of the statute, essentially legal estates. Trusts may also agree or disagree, in point of limitation, with the Common Law, but being merely the creatures of equity, they reject altogether such of those rules as are founded on the strict principles of tenure. Thus, if the estate be vested in A., in trust for B. for life, and after his death, for the unborn children of C. in tail, and on failure of such issue, for D. in fee, B., C.'s issue, and D.

take, in equity, beneficial interests corresponding, in quantity and quality, with the legal estates which they would have taken under similar limitations at the Common Law, or by way of use. But B., though styled equitable *tenant* for life, does not *hold* of anybody, and consequently cannot *forfeit* his life interest. So, the trust in favour of the children is not a contingent *remainder*, and consequently not exposed to failure from the same causes which affect contingent remainders (*a*), but, on the contrary, is capable of effect notwithstanding the determination of the life-interest of B. before the contingency of the birth of a child of C.

—but are subject to the ordinary rules of law.

(86.) Of the rules of law, therefore, such as measure the duration of the enjoyment, or regulate the devolution and transmission of estates, are extended by analogy to the trust; while such as peculiarly concern the possession or seisin of the land itself are applied and confined to the legal estate in the trustee. But, of course, when the trust comes to be carried into execution by an actual conveyance, the estates to be created by

(*a*) *Ante*, (47.), (48.), (49.), (50.)

such conveyance will be legal estates for all purposes.

Trusts disagreeing with the common law, restrained only by the rule against perpetuities.

(87.) As trusts, then, limited agreeably to the Common Law, reject its harsher rules, so trusts are, *à fortiori*, susceptible of all those irregular forms of which uses admit (*a*). Springing and shifting or future trusts are, therefore, allowed without any other limit than that, which, on broad grounds of policy, the rule against perpetuities (*b*) has assigned to all limitations.

Alienation of equitable interests;

(88.) Again, and on the principles already explained (*c*), trusts are peculiarly favoured in point of alienation. The benefit of a trust, of what kind soever, whether vested or not, and though it should confer an interest equivalent to an estate of freehold, may be transferred by any form of instrument, or rather by any instrument however destitute of form, which expresses the intention, provided it be in writing and signed by the party to be bound, or by his agent lawfully authorized (*d*).

(*a*) *Ante*, (31.), *et seq.* (*b*) *Ante*, (60.), *et seq.* (*c*) *Ante*, (86.)
(*d*) 29 Car. 2, c. 3, (Statute of Frauds).

—by married women and tenants in tail.

(89.) The last position, however, is subject to two exceptions: the one in regard to married women, the other in regard to tenants in tail. When the conveying party is a married woman, the instrument must be a deed, (that is, under seal), and be perfected with certain solemnities (*a*), and if the conveying party be entitled to an estate tail, then, in order to bind either the issue in tail, or those in remainder or reversion, the form of conveyance adapted to the case of a substituted legal estate in fee must be observed, and the ceremony of enrolment be superadded (*b*).

CHATTEL INTERESTS.

CHATTEL interests in land, as terms of years, which, though anciently of small estimation, now form a large and important part of the real property of the kingdom, require a separate consi-

(*a*) 3 & 4 Will. 4, c. 74, s. 77, &c.; 4 & 5 Will. 4, c. 92, s. 68, &c. (Ireland).

(*b*) 3 & 4 Will. 4, c. 74, s. 41, &c.; 4 & 5 Will. 4, c. 92, s. 38, &c. (Ireland).

deration. In order to understand clearly the rules which govern these interests, we must again distribute the subject under the several heads of Common Law, Uses, Devises, and Trusts; distinguishing, as respects the Common Law and Uses, between the creation and the transfer of the interest.

Of chattel interests at the common law; —how created;

(90.) I. The original limitation, at the Common Law, of a term of years is denominated a demise or lease. Such a limitation may be the sole, or the principal object of the instrument, as when A. simply demises to B. for twenty years, without more, or it may be included in a conveyance of the freehold or the fee, as when A. makes a feoffment or a grant to B., to hold to B. for twenty years, and from and after the expiration of the term, to C. for life, in tail or in fee, or makes a feoffment or a grant to C., to hold to C. for life or in tail, and after his death, or on failure of his issue, to B. for twenty years. In the case of the simple demise, B. must enter upon the land in order to perfect his title, for before entry, he has no *estate*, but merely a species

of inchoate interest called an *interesse termini*, (which, however, unlike an executory freehold interest, is transferable even at law); in the case of the feoffment or the grant, an estate of freehold or inheritance passes presently out of the feoffor or the grantor, and B. becomes at once possessed of the term, as a constituent part of the estate conveyed.

—in futuro; (91.) A term of years may be well created at the Common Law, without observing the rules prescribed by that law for the creation of an estate of freehold, which rules require, as we have seen (*a*), that the estate should be made to commence presently, or on the instant of the determination of an estate commencing presently. Thus, if A. demises or leases to B., from Christmas next, for twenty years, or makes a feoffment, or a grant, to C. for life, and after his death and one day, to B. for twenty years, in either case the limitation of the term is valid; though B. has merely an *interesse termini* (as distinguished from an estate) until, in the former case, Christmas, and an entry (*b*) by B., and, in the latter case,

(*a*) *Ante*, (25.), (26.) (*b*) *Ante*, (90.)

the expiration of one day from the death of C., and an entry by B. An estate involving the seisin of the freehold can never be postponed or suspended at the Common Law, unless the limitation be strictly a remainder (*a*); but the interest of a lessee for years may, even at the Common Law, be future or uncertain, without regard to any other rule than the general rule against perpetuities (*b*).

—defeated by matter subsequent;

(92.) So, a vested estate of freehold, (whether taking effect at the Common Law, or by way of use, or of devise), cannot be divested or defeated by matter subsequent, or, in other words, contrary to the terms of its original limitation; and therefore, if, after a feoffment, grant, limitation of use, or devise to A. for life, A. and the reversioner agree, though by deed, that from a given period, or on a given event, the estate of A. shall be defeasible by the re-entry of the reversioner, the agreement (unless it amount, as, under particular circumstances, it may do, to a covenant to stand seised, and so create a springing use) is of no effect to alter the title. But

(*a*) *Ante*, (24.) (*b*) *Ante*, (60.), *et seq.*

a term of years may be divested or defeated by matter subsequent; and therefore, if, after a demise to A. for twenty years absolutely, completed even by his entry, A. and the reversioner agree that, from a given period, or on a given event, the term shall be defeasible by the re-entry of the reversioner, the agreement is effectual;—of which principle, indeed, we have a practical example in the instance of a lease, when the usual condition of re-entry for breach of any of the covenants, one being a covenant against assigning without license, is, after having been dispensed with by the granting of a license to assign, revived by a subsequent instrument.

—not susceptible of limitation by way of remainder.

(93.) The doctrine of remainders is inapplicable to terms of years, which admit of derivative, but not of consecutive limitations. A., termor for twenty years, may underlet to B. for twenty years, less by one day, if B. shall so long live, and then grant the reversion to C.; but the effect of an assignment by A. to B. for life, and after his death to C., would be to vest absolutely the whole term in B., the ulterior limitation to C. being void, except so far as it might be binding in equity on

B. and his representatives, under the doctrine of trusts.

(94.) II. Terms of years, in common with every other modification of interest in land, may be derived out of the freehold or the fee by way of use. When, therefore, A., owner of the freehold or inheritance, makes a feoffment or a grant to B. and his heirs, to the use of C. for twenty years, or a bargain and sale to C. for twenty years, C. becomes possessed, under the statute, of a legal term for twenty years, and entry is unnecessary to complete his title. The term, whether limited to arise presently or from a future period, or in event only, will be at once effectually limited, provided the rules prescribed for the raising of uses be observed, and the rule against perpetuities (*a*) be not transgressed.

Of chattel interests by way of use; —how created;

(95.) But when the term, although created under the doctrine of uses, is once in existence, its legal condition, as regards dispositions *inter vivos*, is regulated by the Common Law exclusively, and

—not transferable.

(*a*) *Ante*, (60.), *et seq.*

is, therefore, to be partly collected from the preceding heads relative to terms created by demise. For, as a chattel interest, though it may be fed by, cannot itself feed a use, the facilities afforded by uses for escaping from the strict requisites of the Common Law, are confined, as respects those interests, to their creation. This circumstance, among others, distinguishes them, much to their disadvantage, from freehold interests.

Of chattel interests by way of devise;

(96.) III. Whatever may be effected, by way of use, in regard to the original limitation of a term of years, may, of course, be equally effected by devise (*a*), for devises are not, in any instance, *less* ductile than uses.

—admit of executory devises.

(97.) It happens, indeed, from an extension of the indulgence shewn towards a man's last will to all interests, and from the non-admission of chattel interests to a full participation in the facilities afforded by uses, that devises of such interests are *peculiarly* privileged. Hence, if A., a termor, devises to B. for life, and after his death

(*a*) *Ante*, (38.), (39.)

to C., the term, though wholly vested in B., is not *absolutely* vested in him, but is subject to an executory bequest (*a*) in favour of C., under which, if B. should die before the expiration of the term, the then residue of the term will be executed in C., in point of estate. In the meantime the executory interest of C. may be released to B., but is not otherwise transferable, *inter vivos*, though it may be devised (*b*), or be bound by contract in equity.

Of chattel interests, as regards trusts.

(98.) IV As the only rule necessary to be kept in view, in regard to trusts generally, is the rule against perpetuities (*c*), we need only observe, under this head, that in proportion as chattel interests are denied the legal facilities resulting from uses, they naturally become the subject of trust limitations.

(*a*) *Ante*, (38.), (39.) (*b*) See 1 Vict. c. 26, s. 3.
(*c*) *Ante*, (60.), *et seq.*

CONCLUDING REMARKS.

General summary.

THUS we have briefly shewn what are the limits fixed by the Common Law to the creation and transfer of estates; how uses and devises sometimes observe, and sometimes transgress those limits, and, accordingly, do or do not submit to be governed by Common Law rules; and in what respects trusts are yet less technically fettered.

The artificial character of the system traced to its various sources;

It must be admitted that the distinctions which we have endeavoured to explain are highly artificial, and that, considered abstractedly, they appear arbitrary and capricious; but they are inveterate, well defined, and strictly observed. They afford the only key to problems which present themselves at every step of the student's progress. Nor is it difficult to account for these distinctions by referring them to their several

—the ancient Common Law;

sources. The ancient Common Law essayed to wield the land itself,—"the most ponderous and immovable of all the elements." Hence all its rules and forms regarded real property as more or less identified with actual possession. The

single consideration that *livery* was the primitive mode of conveyance, for which other forms were but substitutes, and that a man could not deliver seisin to himself, explains many, otherwise inexplicable, doctrines. But when Uses introduced the refinements of ideal property, other rules than those of tenure were required. Two concurrent systems now flourished; the one strict and jealous, governing the soil in subservience to a particular policy; the other comparatively liberal, administering the usufruct more in accordance with the wants of mankind at large. As yet the beneficial ownership was but faintly developed, and but imperfectly regulated by definite laws; vague notions of reason and convenience often furnishing the only limits. Uses, on afterwards mingling, under the statute, with the ancient system, softened, not subdued, its rigour—liberating, for the most part, the creation of estates from its severer rules (*a*), but leaving estates, when, by what means soever, actually created, subject to those rules (*b*): in short, uses facilitated *conveyancing* without ameliorating *tenure*. In process of time, the space occupied by uses

—Uses, before the statute;

—Uses, after the statute.

Trusts.

(*a*) *Ante*, (31.), *et seq.* (*b*) *Ante*, (35.)

before the statute was more than supplied by trusts, which, at once enlarging the previous equitable bounds, and forming themselves into a well-regulated system, reconciled a wide departure from the maxims of the Common Law with fixed principles.

General result.

In the result, we have the Common Law retaining its ancient strictness; Uses (to which Devises stand assimilated) of force to convey and to modify at will the legal estate, (not being less than an estate of freehold(*a*)); and, lastly, Trusts, which enjoy an absolute exemption from tenure and its rigid rules. All these different elements work together without disorder; and in order that they may work, though by various means, to the same salutary end, all are alike restrained, in their tendency towards a perpetuity, by one universal law.

(*a*) *Ante*, (96.)

THE END.